IN THE

Supreme Court of the United States

October Term, 1960

No. 289

RAILWAY EXPRESS AGENCY, INC.,

Petitioner,

AGAINST

W. R. GRACE & CO.,

Respondent.

RESPONDENT'S BRIEF

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W. R. GRACE & CO.,

Respondent.

RESPONDENT'S BRIEF

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States.

Respondent, the plaintiff below, resists review of the judgment of the Court of Appeals of the State of New York, dated and entered June 9, 1960, which is not appended to the petition. The judgment appended to the petition is merely a ministerial judgment of the New York Supreme Court, the court of original jurisdiction, to enable the enforcement of the judgment of the Court of Appeals and is not reviewable by this court. *Department of Banking of Nebraska, Receiver,* v. *Pink, etc.*, 317 U. S. 264; *Cole* v. *Violette, et al.*, 319 U. S. 581. The Court of Appeals, opinion by Desmond, Ch. J. (8 N. Y. 2d 103), affirmed a judgment of the New York Supreme Court, Appellate Division (R. 205-208; App. A, pp. 17-18), which

reversed the findings of fact of the trial court inconsistent with the findings of fact made by the Appellate Division in its opinion and, in lieu thereof, made new findings of fact contained in its opinion, and modified a judgment of the Supreme Court, New York County, entered after trial to the court without a jury, by increasing respondent's recovery to $56,245.75, the actual value of the platinum lost in interstate transportation by the petitioner—common carrier by rail, less the unpaid transportation charges of $128.03, for a net recovery of $56,117.72, with interest and costs (R. 208, 211, 219; App. A, p. 18; App. B, p. 29). It is elementary now that the facts found by the Appellate Division are conclusive on this Court. *King* v. *West Virginia*, 216 U. S. 100; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 97; *Chrisman* v. *Miller*, 197 U. S. 319.

Petitioner's position is placed, at least in great part, upon facts reversed and found to the contrary by the Appellate Division.

Jurisdiction

The grounds, upon which petitioner invokes the jurisdiction of this Court, are entirely without substance or support.

(1) This Court has long since settled the questions of law involved and the decisions of the Court of Appeals and Appellate Division of New York completely conform thereto.

(2) (a) The New York Court of Appeals and Appellate Division have decided the federal questions of law strictly in accordance, and not in conflict, with the applicable decisions of this Court.

(b) The Court of Appeals of New York has *not* departed from the accepted and usual course of judicial review. Such a statement by petitioner to the contrary is incomprehensible. Petitioner appealed of right to the Court of Appeals, filed the proper record on appeal with several separate exhibits and a 42 page printed brief, and was accorded the greater part of an hour's full oral argument before the Chief Judge and the six Associate Judges, *en banc*. Every member of the Court passed on petitioner's points, and the result is in absolute accord with the decisions of this Court.

(c) The decision in this case affects *only* the petitioner and only in this case. Only the petitioner express company and possibly some air express or freight carriers have a "Money Classification and Tariff" or Special tariff provisions under which they may transport precious metals only at actual value and with *no* order by the Interstate Commerce Commission or the Civil Aeronautics Board authorizing a "declared value" or limitation of liability. The railroads and motor carriers are not in the least affected—they are not authorized to transport precious metals or other articles of extraordinary value.

(3) The decision and judgment of the Court of Appeals is *not* against any title, right, privilege or immunity, and the authority exercised under the United States, to which petitioner has any valid claim.

Questions Presented by the Case

The questions of law presented by the case and decided by the New York Court of Appeals and the Appellate Division, were not as stated by petitioner. We, therefore, state them here.

1. May the petitioner express company, a common carrier by rail, subject to the Interstate Commerce Act, apply the First Class pound rates established by its Merchandise Classification and Tariffs and an authorizing order of the I. C. C. for the transportation of ordinary merchandise based upon weight and a released or declared valuation, to a shipment of crude platinum (a precious metal) lost by it in transit and escape liability for the full actual value thereof, where it was not authorized by the Commission to transport the same under the said Merchandise Classification or under a released or declared valuation or limitation of liability but was authorized to transport the same *only* under petitioner's Money Classification at actual value at "Gold-Coin Rates" applicable to the actual value of the property shipped, and no order had been issued by the Commission authorizing petitioner to establish rates for such transportation based upon a released or declared valuation or to limit the amount of its liability?

2. Was petitioner bound by its Money Classification and Tariffs filed with and approved by the Commission and applicable to the shipment involved?

3. Did the applicable Classification and Tariffs filed with and approved by the Commission constitute the contract of carriage and control the rights and responsibilities of the parties where the form of Receipt issued by petitioner's agent was not the proper form of Receipt required to be issued for the known specific class of property shipped and its provisions were contrary to and in violation of the said Classification and Tariff?

4. Could the acts of petitioner's receiving agent, intentional or unintentional, create rights and responsibilities of the parties other than and different from those

established by the applicable filed Classification and Tariff?

Questions 1 and 4 above were answered in the negative and questions 2 and 3 above were answered in the affirmative, which strictly adhered to the determinations of this Court in construing and applying the Interstate Commerce Act (49 U. S. C. A., Sec. 20 (11)).

Statement of Case

We state the case here because the petitioner's statement is incomplete and contains inaccuracies and facts which were reversed by the New York Appellate Division and are contrary to the facts found by that Court.

We note at the outset that there was no fraud or deceit practiced by the shipper upon petitioner (R. 219; Pet. A-1, A-3, A-4).

At the times material hereto, petitioner's Classification and Tariffs, filed and approved by the Interstate Commerce Commission and lawfully in effect, was divided into two separate major parts, to wit: "Merchandise Classification" (Plf's Ex. 4, pp. 3-17, 20-73; R. 243) and "Money Classification" (Plf's Ex. 4, pp. 74-79; R. 213; Ex. 4-A, pp. 6-11).

The "Merchandise Classification" specified the "Class Rates" (First Class, Second Class), "Commodity Rates" and "Live-Stock Rates" applicable to ordinary merchandise and live-stock and contained *no* provisions with respect to "platinum" (precious metals), the property here involved, other than "articles manufactured thereof" (Plf's Ex. 4, pp. 14, 68, Item 2420). The Merchandise Classification" also contained the "Uniform Receipt" form (which was improperly issued by petitioner

in this case) and the "Live-Stock" forms (Plf's Ex. 4, pp. 39, 40-44) and the "Carvings, Ceramics, etc." form (Plf's Ex. 4, p. 45). The "Class Rates", which were applicable to ordinary merchandise shipments, were "base rates" per pound of weight where the shipment was released to a value of $50 or .50¢ per pound actual weight if the weight was over 100 pounds. The "Merchandise Classification" contained "Rule 13. Valuation Charges" which provided for "valuation charges" on ordinary merchandise shipments, in addition to the "Class" or "Base" pound rates, of .19¢ per $100, or fraction thereof, of values in excess of the $50 or .50¢ per pound declared in writing by the shipper. The "base rates", valuations, valuation charges and limitations of liability applied to and were effective only on shipments of property specified in the Rule and in orders of the Commission authorizing the same. Neither the "base rates", valuations, valuation charges, limitations of liability nor any authorizing order of the Commission applied to "platinum", the property involved herein. For ordinary merchandise shipments, the "Uniform Express Receipt" was used (R. 75), the original issued to the shipper and the duplicate original retained by petitioner as its only record of the shipment until when and if it reached its destination a delivery receipt was obtained from the consignee, petitioner's "pick-up" agent merely tossing it from his truck on to the terminal platform for forwarding without obtaining any receipt or record whatsoever (R. 132-133). "Ordinary merchandise is something very distinct in the classification of the company from jewels and precious metals" (R. 169).

The "Money Classification" provided the only authority, conditions and rates under which petitioner was permitted to transport "platinum" (Plf's Ex. 4, pp. 74-76, as Am'd by Plf's Ex. 4A, Supp. 23, pp. 7, 9, Rules 41 B(b)

and 43-B(h) Pet. A-2) and required petitioner to issue a "Money receipt" for all matter received (Plf's Ex. 4-A, Supp. 23, p. 6, Rule 40-A(a)), which was not done in this case (Pet. A-3). The provisions governing are as follows:

> "(h) PRECIOUS METALS, N. O. S. (not otherwise specified):
>
> Precious Metals * * * (Platinum *) not including articles manufactured thereof will be charged for at Gold Coin Rates named in Rule 41-B(b), page 7 of this supplement on actual value and First Class Package rates on weight in excess of 2 pounds to the $1,000 actual value. * * * " (Plf's Ex. 4-A. Suppl. #23, p. 9. Rule 43-B(h)).

Rule 40-A(e) of the "Money Classification" (Plf's Ex. 4-A, Supp. #23, p. 6) expressly excludes the application of Rule 13 (Valuation Charges) of the "Merchandise Classification" from any application to precious metals (Platinum) where a "mixed shipment" is made containing both precious metals and ordinary merchandise.

"Money Classification" shipments were handled by the petitioner under person-to-person signature from the petitioner's receiving agent through its "Money or Value Department" into the hands of the consignee at destination. No shipment was permitted to leave the "Value Room" without obtaining a signature from the person taking it therefrom. The "Value Room" was manned by special armed clerks (R. 91-93; 211; Pet. A-4).

On December 20, 1955, Messrs. McDonald and O'Neill of Colamer Company of 535 Fifth Avenue, New York

City, who were, in fact, unfamiliar with the petitioner's Classifications and Tariff (R. 33), in the basement vault of the Chase Manhattan Bank at that address, delivered to a Mr. Mullaney, petitioner's receiving agent of some 22 years service and experience, a box containing some 600 troy ounces of Crude Platinum for transportation to Malvern, Pa., and delivery there to J. Bishop & Co. to refine for the account of W. R. Grace & Co. (R. 26-28, 38). The platinum was contained in two metal containers with screw-tops securely wax-sealed, nested in a wooden box, built for the purpose of shipment, with the lid firmly nailed in place, the box completely wound and covered with 2½" gummed tape and then wired strapped with the wire mechanically sealed. The names and addresses of the shipper and consignee were placed upon the package as well as upon several shipping tags supplied by petitioner and affixed by means of accompanying wires (R. 26-28, 38; Pet. A-3). Mullaney inquired as to contents and weight and was told it was about 50 pounds of platinum (R. 31, 35, 48). Mullaney then asked if "they" wanted to declare a value and they replied $50. Mullaney did not ask for the actual value although he knew that platinum "was a precious metal equivalent to a greater-than-gold value" (R. 53, 58, 154). Mullaney did not consult his copy of the Express Classification to ascertain the proper classification of the property and the appropriate rate. Nor did he refuse to accept the shipment in its condition as tendered to him and in the absence of a statement of the actual value. Neither did he use the "Money Receipt" required by the "Money Classification". Instead, he produced a book of "Prepaid Uniform Express Receipts," which were used only for shipments of ordinary merchandise, wrote in the blank spaces provided therefore, on the original and duplicate, the names and addresses of the shipper and consignee, the description of the property shipped as

"Platinum" and the weight 50 pounds. Then he consulted and applied the First Class Package Rates (Def't's Ex. B) to the weight of 50 pounds and, incorrectly arrived at charges of $2.90, which he entered in the Value Book and collected from the shipper. The original Receipt he signed and delivered to the shipper, put the package on his shoulder and departed (R. 72-76).

Note here that the Receipt (Def't's Ex. A), on which petitioner relies, was admitted in evidence solely as a receipt and *not* as a valid contract of carriage between the parties (R. 38-39).

Mullaney entered the shipment in his "Value Book" as containing "Platinum" (R. 76-77), delivered it as a "Value" shipment personally to O'Connor, the "Value Room" clerk on the Terminal platform, who signed a receipt to Mullaney for the shipment as a "Value" shipment containing "Platinum" (R. 77-78, 89) and, in turn, personally delivered it to the clerk in charge of the "Value Room" and secured his signature therefor as a "Value" shipment containing "Platinum" and the latter placed and kept the shipment in the "Value Room" (R. 89-91). This was the handling required by the petitioner's Classification, Tariff and Rules and was exactly the handling it also would have received if the package contained external wax or lead seals, and if the words "Platinum—actual value $56,245.75" had been endorsed thereon externally (R. 249). The shipment was never delivered to the consignee or returned to the shipper. The petitioner has absolutely no record of the shipment beyond its receipt into the "Value Room" at its Terminal in Sunnyside, L. I., N. Y. Its rules required a signature for every shipment leaving the "Value Room".

The proper charge at Gold Coin Rates on actual value amounted to $130.93. Mullaney collected $2.90, leaving

$128.03 charges due petitioner (R. 211-212). The New York Appellate Division allowed recovery "of $56,117.72 (value $56,245.75, less unpaid transportation charges of $128.03)" (R. 211; App. B, pp. 21, 29).

REASONS FOR THE DISALLOWANCE OF A WRIT

I

Petitioner's Official Express Classification and Tariffs required transportation of platinum at actual value. The Interstate Commerce Act proscribed any limitation of liability unless authorized by the Interstate Commerce Commission, which is absent in this case. It is not the function of this Court to permit such a limitation but solely that of the Commission as prescribed by the Act.

The liability of the petitioner was that imposed by the Interstate Commerce Act (40 U. S. C. A., Sec. 20 (11)) as measured by the contract of carriage so far as it was valid under the Act. *Georgia, etc. R. Co.* v. *Ward*, 244 U. S. 383, 387; *Georgia, Fla. & Ala. Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197. The contract of carriage consists of the *appropriate* receipt, if issued by the petitioner (which was not done in this case), and the lawful Classification and Tariff on file with the Commission and in effect on the date of shipment. *Burke* v. *Union Pacific R. R. Co.*, 226 N. Y. 534, affirmed sub nom. *Union Pacific R. R.* v. *Burke*, 255 U. S. 317; *American Railway Ex. Co. Inc.* v. *Lindenberg*, 260 U. S. 584; *Louisville & N. R. R. Co.* v. *Chatters*, 279 U. S. 320, 331; *Davis* v. *Henderson*, 266 U. S. 92. The Classification and Tariff filed with and approved by the Commission have the force of a statute and cannot be varied under any pretext. No party can lawfully depart from them and no act of either party,

intentional or unintentional, can create any rights or responsibilities other than or different from those fixed by the filed Classification and Tariff. *Louisville & N. R. R. Co.* v. *Maxwell*, 237 U. S. 97; *Dayton Coal & Iron Co., Ltd.* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 239 U. S. 446; *Burke* v. *Union Pacific R. R. Co., supra*, 543; *Pennsylvania R. R. Co.* v. *Int. Coal & Mining Co.*, 230 U. S. 184, 187; *American Railway Ex. Co. Inc.* v. *Lindenberg*, 260 U. S. 584. "By these schedules the carrier was bound, and to them it was limited, in contracting for traffic." *Southern Ry. Co.* v. *Prescott*, 240 U. S. 632, 638; *Union Pacific R. R. Co.* v. *Burke*, 255 U. S. 317, 319. The Classification, Tariff and Receipt form were all prepared and printed by petitioner. "* * *, where there is any ambiguity in the terms of the contract prepared by one of the parties 'it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against' such party (citing)." *Rentways, Inc.* v. *O'Neill Milk & Cream Co.*, 308 N. Y. 342, 348.

Petitioner gives prominence to the words "all property" in Rule 1(a) and "property" in Rule 13(a) of the "Merchandise Classification" which it considers and extends entirely out of context. Rule 1(a) expressly provides that the First Class Package rates "are applicable * * *, unless otherwise hereinafter provided" and it is specifically "otherwise provided" by Rule 43-B(h) of the "Money Classification" (Plf's Ex. 4-A, Supp. =23, p. 9) that "Precious Metals * * * will be charged for at Gold Coin Rates named in Rule 41-B(b), page 7, of this supplement on actual value". Even a ready reading of the Rule 1 makes it obvious that it relates entirely to the "Class" and "Commodity" package or pound rates contained in a separate Tariff (Deft's Ex. B) applicable only to ordinary merchandise. That Rule 1 applies only to ordinary merchandise is established by the following provisions contained in petitioner's Official Express Clas-

sification #36, I. C. C. No. 8200, issued January 16, 1956 (less than a month subsequent to the shipment here involved) and effective March 1, 1956:

"MERCHANDISE CLASSIFICATION RULES.

RULE 19. DEFINITIONS.

* * * * * *

(i) 'Rate' and 'Class' as appearing in the Classification mean as follows:

1. 'Rate' means the specific figure published in Express Tariffs (Class or Commodity) to be used in computing the charge on property transported.

2. 'Class' signifies the numerals (1st Class, 2nd Class, percentages or multiples thereof, etc.) used in this Classification to identify the rate published in Local and Joint Schedules of First and Second Class Express Rates lawfully on file with Regulatory Bodies with which this Classification is filed". (Referring to the package or pound rates published in Deft's Ex. B).

Also in Classification No. 36, Rule 1(a) of the "Merchandise Classification Rules" refers expressly to "this Classification" instead of to "the Classification".

A running reading of Rule 13 of the "Merchandise Classification" and the "Released Rates Order" No. 848 of the Commission reveals that they not only form a part of the "Merchandise Classification" but are expressly limited to shipments of specific ordinary merchandise. It is significant that neither Rule 13 nor the Released Rates Order are referred to in Rule 43-B(h) of the "Money Classification" (Plf's Ex. 4-A, Supp. #23, p. 9) as the statute (49 U. S. C. A., Sect. 20(11)) and the Or-

der expressly require in order that they may be effective. Rule 40-A(e) of the "Money Classification" (Plf's Ex. 4-A, Supp. #23, p. 6) expressly excludes the application of Rule 13 of the "Merchandise Classification" to shipments of precious metals.

Rule 40-A(c) and (d) does not determine the applicable rate. The character of the property—precious metals—platinum—is the determining factor and the only applicable rates for such property are the Gold Coin Rates *on actual value*. This Rule merely provides protective procedures for the benefit of petitioner affording it the right to refuse to accept shipments which do not comply therewith without incurring liability for such refusal. The requirement of subdivision (c) that the shipper mark the actual market value upon the package is merely a protective provision to avoid the penalties imposed upon the carrier by the Act (49 U. S. C. A., Sec. 10) for assessing and collecting charges based upon less than the actual market value. Petitioner's agent did not require it in this case, did not ask for the actual value but merely asked "if the shipper wished to declare a value" and he knew that the shipment contained 50 pounds of platinum having a greater-than-gold value. Petitioner handled the shipment in exactly the same manner and provided the same service it would have accorded the shipment if the actual market value had been marked on the package. It has been specifically found as a fact that this omission did *not* in any way occasion or contribute to the loss. Petitioner may not defend on this ground. *Siebert* v. *Erie R.R. Co.*, 189 App. Div. (N. Y.) 586, 179 N. Y. S. 136, affirmed 232 N. Y. 517, 134 N. E. [illegible].

The requirement of subdivision (d) regarding wax or lead seals does not require either of them to be affixed externally. This provision is merely to protect against pilferage or extraction of contents or a portion thereof in

transit. The loss here was of the entire package, not pilferage or extraction of contents. Hence, this omission, if there was an omission, does not furnish a defense for petitioner. *Siebert v. Erie R.R. Co., supra.* Further, the metal containers were securely sealed with wax; the box containing them was securely nailed and closed and completely sealed with heavy gummed tape and then securely strapped with wire which was mechanically sealed. This requirement was abundantly satisfied.

There was no provision in the Classification or Tariffs which afforded the shipper a choice of shipping under the "Money Classification" or under the "Merchandise Classification". There was no order of the Commission authorizing such procedure and no order authorizing "released values" or limitations of liability on shipments of platinum.

II

The Uniform Express Receipt is not binding in this case.

The Receipt issued by petitioner was introduced into evidence solely as a Receipt and not as the contract of carriage or any part of it (Deft's Ex. A; R. 38-39).

The Receipt was not the proper form of receipt. It was the one provided for ordinary merchandise subject to the "Merchandise Classification". The "Money Receipt" form was required by the "Money Classification" to be used for this shipment. Since it was not in conformity with but contrary to and in violation of the "Money Classification and Tariff" it is invalid and ineffective and the proper Classification and Tariff apply. *American Ry. Ex. Co. Inc. v. Lindenberg,* 260 U. S. 584; *A. C. Lawrence Leather Co. v. Campagnie Generale Trans-*

atlantique, 18 F. 2d 930, cert. denied 274 U. S. 761; *Bragg* v. *Taylor*, 205 App. Div. (N. Y.) 59, 199 N. Y. S. 156, aff'd 236 N. Y. 666.

In all of the cases cited by petitioner at pages 14 and 15 of its petition, the lawful applicable tariffs provided and the Commission authorized by orders, "released values" and rates dependent thereon with attendant limits of liability. The railroad cases all involved ordinary merchandise or livestock, for they are not authorized to transport property of extraordinary value, such as platinum.

The express cases also all involved ordinary merchandise subject to the "Merchandise Classification". None of them involved property subject to the "Money Classification". *Adams Express Co.* v. *Croninger*, a diamond ring (Plf's Ex. 4, p. 60, Items 1525, 1530); *American Ry. Ex. Co. Inc.* v. *Daniels*, ordinary merchandise; *American Ry. Ex. Co. Inc.* v. *Lindenberg*, contents of trunk ordinary merchandise; *Southeastern Exp. Co.* v. *Pastime Am. Co.*, motion picture film (Plf's Ex. 4, p. 64, Items 1935, 1950); *Peyton* v. *Railway Ex. Agcy., Inc.*, ordinary merchandise; *Feinberg* v. *Railway Ex. Agcy., Inc.*, mink coat; *George N. Pierce Co.* v. *Wells Fargo Ex. Co.*, automobiles (Plf's Ex. 4, p. 71, Item 2960).

III

No act of petitioner's agent can vary the rights and responsibilities of the parties as fixed by the proper receipt and the applicable classification and tariffs.

We have already demonstrated this under our Point I. The "Uniform Express Receipt", which was *not* in evidence as a contract of carriage or a part thereof (Deft's Ex. A, R. 38-39), was an improper receipt. The "Money

Classification" required the use of a "Money Receipt." However, the "Money Classification" and the Gold Coin Rates on actual value apply and an interstate common carrier of goods for hire may not limit its liability under the Act (49 U. S. C. A., Sec. 20(11)) without an authorizing order by the Commission and the establishing of a "rate tied to the release." *Hart* v. *Pennsylvania R.R. Co.*, 112 U. S. 331; *Adams Ex. Co.* v. *Croninger*, 225 U. S. 491.

The case of *American Trust Co.* v. *American Ry. Ex. Co. Inc.*, involved a hold-up and robbery of money being conveyed by plaintiff in defendant's truck from its office to defendant's office for shipment. The "Money Classification" at that time provided that such shipments would not be received except at defendant's receiving office. It was held defendant had not received or accepted the shipment and, hence, was not liable. We have no such provision or question here.

The *New York Central* case involved baggage and the *Kansas City Southern Ry. Co.* case involved household goods. In both cases lawful tariffs providing for "released values" and limitation of liability had been filed with and approved by the Commission and authorizing orders issued permitting them. We have no such situation here.

WHEREFORE, your respondent respectfully prays that the petition for a writ of certiorari herein be denied.

Respectfully submitted,

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Appendix A

ORDER OF MODIFICATION AND AFFIRMANCE BY NEW YORK APPELLATE DIVISION

At a Term of the Appellate Division of the Supreme Court, held in and for the First Judicial Department, at the Courthouse in the County of New York, on the 19th day of January, 1960.

Present:

HON. CHARLES D. BREITEL,
Justice Presiding,
" BENJAMIN J. RABIN,
" MARTIN M. FRANK,
" FRANCIS L. VALENTE,
" HAROLD A. STEVENS,
Justices.

W. R. GRACE & Co.,
Plaintiff-Appellant,

AGAINST

RAILWAY EXPRESS AGENCY, INC.,
Defendant-Respondent.

An appeal having been taken to this Court by the above named plaintiff-appellant from so much and such part of the judgment of the Supreme Court, New York County, entered January 7, 1959, which limited the recovery of the plaintiff to the sum of $50.00 and awarded

judgment for costs in favor of the defendant against the plaintiff; and said appeal having been argued by Mr. Emmet L. Holbrook, of counsel for the appellant, and by Mr. James V. Lione, of counsel for the respondent, and due deliberation having been had thereon; and upon the decision and opinion of this Court filed herein on December 15, 1959; it is hereby unanimously

ORDERED AND ADJUDGED, that the judgment so appealed from be, and the same hereby is, modified, on the law and the facts, so as to allow recovery in favor of the plaintiff in the amount of $56,117.72, the damages sustained and proved by the plaintiff, with interest and costs, and, as so modified, the said judgment is affirmed with costs of this appeal to the plaintiff-appellant; and it is further unanimously

ORDERED AND ADJUDGED, that the Clerk is hereby directed to enter judgment in favor of the plaintiff in the amount of $56,117.72, with interest from December 20, 1955, plus the costs of this action and the costs of the appeal; and it is further unanimously

ORDERED AND ADJUDGED, that the findings of fact contained in the opinion of the court at Trial Term which are inconsistent with the findings of fact made by this Court in its opinion be, and the same hereby are, reversed and, in lieu thereof, this Court makes the new findings of fact contained in its opinion, which is hereby referred to and made a part of this order.

Enter,

HAROLD A. STEVENS
Justice

Appendix B

OPINION OF THE NEW YORK APPELLATE DIVISION
9 App. Div. 2d (N. Y.) 425, 193 N. Y. S. 2d 780

SUPREME COURT,

APPELLATE DIVISION, FIRST DEPARTMENT.

Dec. 15, 1959.

W. R. GRACE & Co.,
Plaintiff-Appellant,

v.

RAILWAY EXPRESS AGENCY, INC.,
Defendant-Respondent.

Before BREITEL, J. P., and RABIN, FRANK, VALENTE and STEVENS, JJ.
STEVENS, Justice.

Plaintiff appeals from so much of a judgment entered January 7, 1959, after trial, as limited plaintiff's recovery to $50 and awarded costs to defendant.

Briefly the undisputed facts are that the defendant, by one of its drivers, on December 29, 1955, at the vaults of the Chase Manhattan Bank, 535 5th Avenue, New York City, picked up a shipment of crude platinum in a box weighing approximately 50 pounds directed to Bishop & Co., Malverne, Pa. There was no wax or lead seal on the outside of the box as required for precious metals. Neither the full value nor the identity of the contents was written

thereon, nor was the driver told the actual value of the shipment. When the driver asked the contents of the package he was informed that it contained platinum, and a valuation of $50 was declared by the shipper. The driver gave an ordinary merchandise freight receipt upon which he wrote the word "Platinum." This was a prepaid shipment for which the driver collected $2.90, the ordinary freight rate. The receipt by its terms limits liability to $50.

The driver entered this shipment in his value book, a book in which any shipment which has a declared value of $50 per pound or more is entered, and subsequently delivered the same to defendant's express depot in Long Island City, where he received a signature receipt from one O'Connor, defendant's value man. O'Connor testified by deposition that he questioned the driver as to what made this shipment of value, there being no seals on the box, and was told "it's platinum. I have it written on the sheet."

Thereafter O'Connor took the shipment to the value room, delivered it to Mitchell Robinkoff, the money clerk, and obtained a signature receipt from him. O'Connor told Robinkoff that he (O'Connor) had been told by the driver that the box contained platinum, and the sheet signed by Robinkoff had the word "platinum" written thereon.

Under the rules and practices of the defendant, any shipment leaving the value room was supposed to be signed for, but no receipt was obtained for this shipment which was never delivered.

Plaintiff brought suit to recover the full value of the platinum and offered proof to establish its claim in the

amount of $56,245.75. The defendant admitted acceptance of the box, the giving of a receipt, collecting $2.90, and alleged the shipper declared a value of $50. As a separate defense defendant alleged that the shipment was delivered and received "only under and pursuant to and subject to the terms and conditions of a special contract in writing for the carriage of the same" entered into at the time of delivery and acceptance of the package. Further, that the terms and conditions of such contract were established, filed and posted as required and authorized by Act of Congress and orders of the Interstate Commerce Commission. And by the terms of the special contract in writing its liability was limited to $50, the value placed upon the property. Recovery was allowed, after trial, but limited to $50. The defendant has not appealed so the question of liability is not before us.

Plaintiff on this appeal urges that the defendant is liable for the amount of $56,117.72 (value less unpaid transportation charges of $128.03) with interest, under its applicable official money classification and rates. It contends that defendant did not establish a valid contractual limitation of liability to $50.

There was some testimony that the shipper had declared a lower rate because it carried outside insurance on the metal. There is no dispute that there is a different rate for shipment of ordinary merchandise and money or precious metals. Had the rate for the classification which includes platinum been applied, the transportation charge would have been $130.93, instead of $2.90, the amount actually charged.

The driver who collected the shipment was not armed nor, according to his testimony, had he ever driven a

truck which picked up materials subject to the money receipts. He had, however, from time to time picked up values which were entered in his value book. He testified that he knew platinum was a precious metal equivalent to a greater-than-gold value.

We are faced with the question whether a shipper is entitled to recover the full value for nondelivery of a shipment, where such shipper knowingly failed to package properly or declare its full value and where the transportation charge paid was less than that applicable to precious metals, but where the identity of the contents was given the common carrier at the time of delivery, and such carrier thereafter recognized and treated the shipment as a valued one in accordance with its established procedure.

The defendant, being a common carrier, is prohibited from unjust discrimination in rates or rebates between shippers (49 U.S.C.A. § 2), or the giving of undue or unreasonable preference or advantage to any company, firm or corporation (49 U.S.C.A. § 3(1)). Undue or unreasonable preference does not refer solely to facilities but applies also to discrimination in rates.

[1] Every common carrier, as that term is defined in the Interstate Commerce Act (49 U.S.C.A. § 1), is required to file with the Commission and publish a schedule of rates, fares, freight classification, etc. (49 U.S.C.A. § 6). That was done in this case. Since this was an interstate shipment and Congress has legislated thereon, the law applicable is governed by Federal statutes and decisions. Adams Express Co. v. Croninger, 226 U.S. 491, 33 S. Ct. 148, 57 L. Ed. 314. It is provided that no carrier shall "charge or demand or collect or receive

a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith * * *" 49 U.S.C.A. § 6(7).

[2] A private accommodation by agreement in an interstate shipment will not take precedence over the provisions of the uniform bill of lading approved by, and filed with the Interstate Commerce Commission, so as to relieve a defendant from liability where loss due to theft occurred. This is true though the act done was for the special accommodation of the shipper (Siebert v. Erie Railroad Co., 189 App. Div. 586, 179 N.Y.S. 136, affirmed 232 N.Y. 517, 134 N.E. 553) and the defendant did not issue or deliver to the shipper any bill of lading.

In the case before us defendant filed its Official Express Classification with the Commission as required. Examination of the document reveals that it contains two major classifications, i.e., "Merchandise Classification" and "Money Classification." No provision for the receipt or transportation of precious metals appears under the "Merchandise Classification" but such provision appears under "Money Classification."

Under "Money Classification" it is provided that a money receipt must be given for all matter received, and that shipments must not be received for transportation in the money classification "unless the actual or market value is declared by the shipper and marked by him upon the package." Where the shipment contains precious metals it must be sealed in a certain manner. Provision is made also for mixed packages containing precious metals (Rule 40-A). As a precious metal, platinum was to be charged for at the gold coin rates (Rule 43(h)).

[3] The tariff or rate schedule thus filed became the rate required or imposed by law and became as well the law between the shipper and the carrier, unless and until the Commission determined the rates unreasonable and unjust, and the carrier was prohibited from departing from the tariff. Tariffs filed and published become a part of the contract of carriage. Cf. Burke v. Union Pacific R. Co., 226 N.Y. 534, 124 N.E. 119, affirmed sub nom. Union Pacific R. Co. v. Burke, 255 U.S. 317, 41 S.Ct. 283, 65 L.Ed. 656; New York & Honduras Rosario Mining Co. v. Riddle Airlines, 3 A.D.2d 457, 162 N.Y.S. 2d 314, affirmed 4 N.Y.2d 755, 172 N.Y.S.2d 168. A published tariff, so long as it is in force, is to be treated as a statute, binding upon railroad and shipper alike. Pennsylvania R. Co. v. International Coal Mining Co., 230 U.S. 184, 197, 33 S. Ct. 893, 57 L.Ed. 1446. In that case a shipper of coal which had paid the lawful rate, sought to recover as damages the difference between the amount it received as rebates and the larger sums it claimed had been given other shippers by the carrier. The court reversed a judgment for the shipper and awarded a new trial on the ground that under the statute there was no presumption of loss on the part of the shipper and such pecuniary loss had to be proved. A mere showing of the difference in the amounts of the rebates was not sufficient. The court there recognized, however, the principle of liability.

It has been held that a shipper, by receiving and acting upon an express receipt signed only by the carrier, assents to its terms and that such receipt does not require the shipper's signature (American Railway Express Co. v. Lindenburg, 260 U.S. 584, 43 S.Ct. 206, 67 L.Ed. 414). In that case recovery for damage to the

contents of a trunk was limited to the valuation specified upon the receipt, the shipper being estopped from asserting a higher valuation. Moreover, the receipt there was a proper one because the subject matter was covered by the proper classification, i. e., the merchandise classification. The court pointed out "[T]he transportation charges were in conformity with the tariff, and the receipt issued, insofar as the limitation of liability is concerned, was in substantial accord with the authorized receipt." 260 U.S. at page 588, 43 S.Ct. at page 208. In the case before us the transportation charges were not in conformity with the tariff filed, nor was the carrier unaware of the contents of the package. The receipt, therefore, was not a proper one. Moreover, it deviated from the filed tariff by its failure to include the correct value charge.

In Adams Express Co. v. Croninger, 226 U.S. 491, 33 S.Ct. 148, 57 L.Ed. 314, one of the questions before the court was whether the operation and effect of the contract for an interstate shipment, as evidenced by the receipt, was governed by the local law of the State or the acts of Congress regulating interstate commerce. The court held federal legislation controlled. In the Adams case the answer, to which the plaintiff demurred, alleged, *inter alia*, that the package was sealed and that the defendant did not know its contents or value, that its rates and charges were filed, that plaintiff knew the charges were based on weight-value, and that the receipt issued showed no value. The demurrer was sustained in the trial court and judgment for $137.12, the full value of the ring with interest, was given the plaintiff. On appeal the judgment was reversed with the direction to overrule the demurrer. The shipper was estopped to claim

a higher value than that set forth in the receipt. It should be noted that the demurrer in effect admitted that certain provisions were in the filed tariff and accordingly the receipt given would seem to have been proper under the circumstances.

The statute provides that a common carrier is liable for the actual loss or damage to property caused by it. There are exceptions where the carrier has been authorized or required by the Commission to establish and maintain rates dependent upon value declared in writing by the shipper or agreed upon in writing as the released value of the property, which declaration or agreement may limit liability and recovery to an amount not exceeding the value so declared or released. In such cases the Commission is empowered to make such order as would be just and reasonable under the circumstances and conditions surrounding the transportation. 49 U.S.C.A. § 20(11). No such exceptions are applicable here. Released Rates Order No. 848, effective March 1, 1929, applies to "Merchandise, other than ordinary livestock"; etc., and grants authority "to establish and maintain released rates for the transportation by express of furniture not boxed * * * and of other property as specified in Rule 13, paragraphs (a), (b) and (c) of said Official Express Classification."

Examination of the paragraphs referred to under Rule 13, as they appear in the "Merchandise Classification", particularly when contrasted with the pertinent provisions of Rule 40-A of the "Money Classification" supports this conclusion.

The principle would seem to be "that the charge should bear some reasonable relation to the responsibil

ity, and that the care to be exercised shall be in some degree measured by the bulk, weight, character, and value of the property carried." Adams Express Co. v. Croninger, 226 U.S. 491, 510, 33 S.Ct. 148, 153. In other words, the discrimination or preference in rate differentials which is prohibited is that which is unreasonable or unjust when measured by the transportation standard. Cf. United States v. Illinois Central R. Co., 263 U.S. 515, 44 S.Ct. 189, 68 L.Ed. 417.

In light of the knowledge of the defendant of the contents of the package in this case, the defendant having some appreciation of its value, though not necessarily its full value, it can fairly be said that the charge bore no reasonable relation thereto but was in fact discriminatory or preferential (cf. Siebert v. Erie Railroad Co., 189 App.Div. 586, 179 N.Y.S. 136, affirmed 232 N.Y. 517, 134 N.E. 553) and, as pointed out, the receipt given here was not a proper one. This should have been a money receipt. There was no authorization contained in the filed schedules for the charge made here.

A question similar to that before us was involved in New York & Honduras Rosario Mining Co. v. Riddle Airlines, supra, which had to do with the liability of a connecting or terminal airline carrier, which did not charge the plaintiff in accord with the tariff provision. The court pointed out "The rights and duties of shippers and carriers under the Civil Aeronautics Act are similar to those imposed by the provisions of the Interstate Commerce Act" and that "[T]ariffs filed by an air carrier under this Act are equally as binding as those filed under the Interstate Commerce Act" (3 A.D.2d at page 462, 162 N.Y.S.2d at page 319). The defendant was

held liable for the full value of lost bullion despite a declared or released value of $100 in the air waybill. There, as here, the defendant knew what it was carrying.

As pointed out, the agreed or released valuation should bear a reasonable relation to the rate charged for transportation, and an essential and intelligent choice of rates on the part of the shipper should affirmatively be made to appear, i. e., as between a lower and higher rate offered and obtainable. This, of course, is in the absence of a sanction contained in the filed classifications and schedules, approved by the Commission, which would permit the parties to fix the agreed valuation as a limitation of liability (cf. Burke v. Union Pacific R. Co., 226 N.Y. 534, 124 N.E. 119, affirmed sub nom. Union Pacific R. Co. v. Burke, 255 U.S. 317, 41 S.Ct. 283, 65 L.Ed. 656).

[4] Where a legal freight charge has been fixed by a schedule of rates duly published, filed and posted in accordance with Acts of Congress, a consignee, standing in the place of the owner, is bound to pay the carrier the lawful and correct charges, not those illegally or erroneously computed. And a carrier may maintain an action for the difference or balance. Pennsylvania R. Co. v. Titus, 216 N.Y. 17, 109 N.E. 857, L.R.A.1916E, 1127. Such rate when established becomes by virtue of the Interstate Commerce Act "arbitrary, immutable by the agreement, mistake, or artifice of the parties, and not to be deviated from." 216 N.Y. at page 22, 109 N.E. at page 858. If the carrier is not estopped to recover the legal rate where there has been mistake, error or even illegal computation, there seems little reason why the shipper should be estopped to recover the full value in like circumstances.

Appendix B

[5] On the record before us there is no basis for an estoppel against the shipper, for the carrier was not misled, and its measure of recovery is the loss actually sustained and proved. The carrier is bound by the knowledge of its agents or employees when they receipted for the metal, recognized its identity by writing the word "Platinum" on the receipt, and evidenced some recognition of its value by the care in handling the same. The special accommodation, if such it be termed, was not authorized, and the deviation from the published schedules, without warrant, should not be sanctioned. Emily Shops, Inc. v. Interstate Truck Line, 207 Misc. 557, 139 N.Y.S.2d 561, affirmed 1 A.D.2d 667, 148 N.Y.S.2d 915, affirmed 2 N.Y.2d 405, 161 N.Y.S.2d 46; Elgart & Sons, Inc. v. Peoples Express Co., Inc., 11 Misc.2d 499, 172 N.Y.S.2d 661.

Accordingly, the judgment appealed from is modified on the law and on the facts so as to allow recovery in the amount of $56,117.72, the damages sustained and proved by the plaintiff, with interest and costs to plainfiff-appellant.

Judgment unanimously modified on the law and on the facts so as to allow recovery in the amount of $56,117.72, the damages sustained and proved by the plaintiff, with interest and costs to plaintiff-appellant. Settle order.

All concur.